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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED,
Appellants,

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

JAMES R. SHARP, *Counsel for Appellants*
SHARP & BOGAN
1108 16th Street, N.W.
Washington 6, D. C

Of Counsel:
EUGENE F. BOGAN
WM. J. BARNHARD

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In The

Supreme Court of the United States

October Term, 1956

No......

A. W. Horton, John C. Fryer, and Camarge Trading Company, Incorporated,
Appellants,

v.

George M. Humphrey, Secretary of the Treasury, and the United States Tariff Commission,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Columbia, three judges sitting, entered on June 20, 1956, which ordered dismissed, for want of jurisdiction, a cause of action seeking to enjoin Appellees from enforcing a Finding of Dumping entered by the Secretary of the Treasury; and Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the three-judge District Court ordering dismissal is reported at ——— F. Supp. ———. The order of the single-judge District Court entered in conformity with said opinion is reported at ——— F. Supp. ———. The above opinion and order, together with the Finding of Dumping issued by the Secretary of the Treasury and the report of the two administrative determinations which are conditions precedent to said Finding, are reproduced in full in Appendix A attached hereto.

JURISDICTION

This suit was brought under 28 U.S.C. Sections 1331, 1340, 2201-2, 2282, and 5 U.S.C. Section 1009, to enjoin the enforcement of the Finding of Dumping issued by the Secretary of the Treasury, on the grounds of unconstitutionality of the statute under which the Finding was issued, and invalidity of the Finding itself. The judgment of the three-judge Court, ordering dismissal for want of jurisdiction, was entered on June 20, 1956, and Notice of Appeal was filed in that Court on July 19, 1956. Since an order dismissing the cause of action is the equivalent of an order denying a temporary or permanent injunction, see *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947), the jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. Section 1253. The following decisions sustain the jurisdiction of this Honorable Court to review this judgment on direct appeal: *United Public Workers* v. *Mitchell, supra, Aircraft & Diesel Corp.* v. *Hirsch, supra, Hayes* v. *Port of Seattle*, 251 U.S. 233 (1920), *Van Dyke* v. *Geary*, 244 U.S. 39 (1917).

QUESTIONS PRESENTED

1. Having found that the instant complaint "involves sufficient constitutional problems to warrant the holding of

a Three-Judge Court," did the Three-Judge District Court below err in holding that jurisdiction does not lie in the District Court of this action which seeks to enjoin named Government officials from enforcing a rule or order alleged to be invalid, issued pursuant to an allegedly unconstitutional federal statute?

2. In an action which challenges the constitutionality of the Anti-Dumping Act of 1921, as amended in 1954, as well as the validity of a Finding of Dumping issued by the Secretary of the Treasury pursuant thereto, did the Three-Judge Court below err in holding that exclusive jurisdiction of such an action lies in the United States Customs Court?

3. Did the Three-Judge District Court err in holding that in such an action there is an adequate remedy at law provided by the United States Customs Court, when that Court and the Court of Customs and Patent Appeals have repeatedly ruled that they are without authority to determine the substantive validity of a Finding of Dumping?

4. In an action in which Plaintiffs seek injunctive relief against an invalid agency action which has the effect, inter alia, of terminating Plaintiffs' trade and business in the commodity here involved, did the District Court below err in holding that an adequate remedy is available in the Customs Court, which admittedly has no equity powers?

5. Did the Court below err in holding, in effect, that a Finding of Dumping issued by the Secretary of the Treasury, which is based on erroneous principles of law, which does not accord with the procedural requirements of the Administrative Procedure Act, and which is unsupported by substantial evidence, is not reviewable in any Court?

6. Did the Three-Judge District Court below err in treating as "taxes" rather than as "penalties" the "special dumping duties" which are threatened to be imposed retroactively on United States importers because of business transactions engaged in by their foreign suppliers?

STATUTES INVOLVED

Section 201(a) of the Anti-Dumping Act of 1921, as amended, 19 U.S.C. 160(a), provides as follows:

> "(a) Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the United States Tariff Commission, and the said Commission shall determine within three months thereafter, whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. The said Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160-73 of this title called a "finding") of his determination and the determination of the said Commission. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs officers."

Section 210 of the Anti-Dumping Act, 19 U.S.C. 169, provides:

> "For the purposes of sections 160 to 171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; and the general appraisers, the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law."

The pertinent portions of 28 U.S.C. 1340, 2201, 2202, and

2282; and Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, are set forth in Appendix B attached hereto.

STATEMENT

The Anti-Dumping Act of 1921, like its predecessor, the Anti-Dumping Act of 1916, 15 U.S.C. 72, partakes more of the nature of anti-monopoly legislation than of tariff legislation. It is in all major respects the counterpart of the Robinson-Patman Act, 15 U.S.C. 13, being designed to prevent injurious price discrimination in international trade as the Robinson-Patman Act is designed to prevent injurious price discrimination in interstate trade.

In the enforcement of the Anti-Dumping Act, the Secretary of the Treasury determines whether there has been, or is likely to be, price discrimination of the type proscribed by the statute, and the Tariff Commission then determines whether such discrimination has resulted in, or threatens, injury to a domestic industry. If both these determinations are made, a Finding of Dumping is issued by the Secretary, and his subordinates automatically proceed to assess "special dumping duties" against the importers, according to the formula prescribed by law.

In the application of that formula—i.e., in the fixing of the amount of the "special dumping duty" and its collection—there are many technical problems of import appraisement and tariff classifications, determined respectively by the Customs Appraiser and the Customs Collector. These technical problems, which are admittedly reviewable only in the Customs Court, 19 U.S.C. 169, *supra*, are not involved in the instant proceeding. When and if such problems arise affecting these imports of soil pipe, they will be appealable only to the Customs Court. This cause of action relates only to the constitutionality of the Anti-Dumping Act and to the validity of the Secretary's Finding of Dumping and of the two administrative determinations which are conditions precedent to that Finding.

The first of those determinations in the instant case was made by the Secretary of the Treasury on July 27, 1955, when he advised the Tariff Commission, by letter, that he had determined that imports of cast iron soil pipe from the United Kingdom were being, or were likely to be, sold at less than fair value. This administrative action was taken *in camera*, without public notice, notice to affected parties, hearings, or any opportunity to learn of the charges, to meet them, or to participate in any way in the agency determination. In the absence of any hearings, record, reasoning, justification or administrative opinion, it is impossible for Appellants or a reviewing Court to know the basis of the Secretary's determination, the nature of his investigation, or, indeed, whether there was any investigation at all. Apparently, however, the proceeding was initiated by a complaint filed on or about August 18, 1954, by a single domestic producer of soil pipe. This date has significance only because it means that all imports of this pipe since April 21, 1954, are subject to the assessment of dumping penalties, this being 120 days prior to the Secretary's first "suspicion" of dumping. See 19 U.S.C. 161.

Appellants, who have all been substantial importers of this soil pipe, will therefore, as a result of this Finding, be assessed dumping penalties retroactively on commodities they bought and sold as much as 19 months prior to the date of the Finding and more than a year before Appellants had any knowledge or notice that a dumping complaint had been filed against them or that an official dumping investigation was under way. Moreover, since they first acquired knowledge of these facts and as a direct result of these antidumping proceedings, Appellants have, as a practical matter, been unable to import or sell a single pound of such pipe and have effectively been forced out of the business of importing British standard cast iron soil pipe.

The second administrative determination in this case was made by the Tariff Commission when, on October 26, 1955, 90 days after it received the Secretary's certification,

it announced its conclusion that imports of this pipe were injuring, or were likely to injure, an industry in the United States. This determination was made on investigation which included a one-day public "hearing" on October 21, 1955, only three working days prior to the date its decision was due. In its published decision, although there are 50 or 60 cast iron soil pipe producers scattered throughout the United States, the Tariff Commission ruled, by a 4-1 vote, that the six producers located in California constituted a separate and distinct "industry in the United States." It also determined (by a 3-2 vote) that this "industry in the United States" was being injured, or was likely to be injured, by the imports involved, although uncontroverted official statistics put in evidence before the Commission showed that these imports constituted less than four-tenths of 1% of the cast iron soil pipe produced in the United States.

On the following day, October 27, 1955, the Secretary of the Treasury issued his Finding of Dumping, stating that "*the* industry manufacturing cast iron soil pipe in the United States" was being, or was likely to be, injured by imports of such pipe at less than fair value, although this differed substantially from the Tariff Commission's determination that "*an* industry" consisting of six California producers was being so affected.

On November 18, 1955, Appellants petitioned the Secretary for reconsideration of the Finding of Dumping. On January 25, 1956, this petition was denied by the Secretary. Subordinates of the Secretary were proceeding to assess "special dumping duties" against Appellants, retroactively to their entries since April 21, 1954, when Appellants filed suit in the District Court on March 19, 1956, to enjoin enforcement of the Finding on the constitutional and statutory grounds stated. The three-judge District Court on June 20, 1956, ordered the action dismissed, holding that this cause was within the exclusive jurisdiction of the Customs Court. On June 21, the single-judge District Court entered

the order of dismissal. Notice of Appeal to the Supreme Court was filed on July 19, 1956, and an injunction pending appeal was issued by the District Court on August 1, 1956.

THE QUESTIONS ARE SUBSTANTIAL

The substantiality of the constitutional questions here raised is not an issue in this appeal. Unlike the usual case presented on appeal of a three-judge court's dismissal for lack of jurisdiction, turning on the absence of a substantial federal constitutional question, the appeal in the instant case is from a three-judge decision which specifically concedes the substantiality of the federal constitutional questions presented. The Court below stated:

> "* * * since the Supreme Court has not passed on the matter, we feel that at least the questioned portion of the Act, which is being applied here and which is alleged to impose the tax retroactively, *involves sufficient constitutional problems to warrant the holding of a three-judge court*—provided jurisdiction of these problems is not placed elsewhere." ___ F. Supp. ___, ___; Appendix A, p. 20. (Emphasis supplied.)

Thus, the Court below has held—correctly, we believe—that if this cause is properly in a District Court, it must be a three-judge Court, because of both the issues presented and the remedy sought.

1. Substantial Questions Raised by the Complaint

A summary of the complaint is sufficient to show the grave questions of jurisdiction, procedure and substance, involving both constitutional and statutory requirements, presented by this cause:

Unconstitutionality of the Anti-Dumping Act. The complaint alleges that the Anti-Dumping Act of 1921, as amended, violates the Constitution of the United States in two regards: (a) first, in that the statute permits and authorizes the imposition of retroactive administrative penalties without notice, hearings, or opportunity to know

and meet the charges or otherwise to participate in the administrative process, thus depriving importers of their property without due process of law; and (b) secondly, in that the statute, by failing to define the meaning or the scope of such key words as "dumping," "fair value," "injury," or "industry," and by failing to provide either legislative standards or procedural safeguards, provides for an invalid delegation of legislative power.

Invalidity of Administrative Procedure. The determinations by the Secretary of the Treasury and the United States Tariff Commission, but particularly the *in camera* determination of the Secretary, completely ignored the procedural requirements of the Administrative Procedure Act, although both Appellees are "agencies" as defined in the statute and both determinations, as well as the Finding of Dumping subsequently issued by the Secretary, are clearly "agency actions" within the meaning of that statute (5 U.S.C. 1001 (a), (g)).

Invalidity of "Fair Value" Determination. The "fair value" regulations issued by the Secretary of the Treasury, pursuant to which the Finding of sales at "less than fair value" in the instant proceeding was apparently made, misconstrues the Congressional intent embodied in the provisions of the Anti-Dumping Act of 1921, by accepting as evidence of sales at "less than fair value" a mere mathematical price differential between sales in one national market and sales in another, without regard to whether or not such sales had the purpose or effect of "dumping," or whether the price in the United States market was a "fair" price in terms of that market, or whether the lower price in one market was dictated by the need for meeting competition in that market, or the various other factors that inevitably enter into a determination of a fair price in the sale of any commodity.

Invalidity of "Injury" Determination. The geographical segmentation by which the Tariff Commission deter-

mined that the small number of producers located in one State of the Union constituted a separate "industry in the United States" does not conform either to the statutory requirements for a determination that "an industry in the United States" is being injured, nor did it conform to the determination in the Secretary's Finding of Dumping that "*the* industry manufacturing cast iron soil pipe in the United States" was being injured. The California producers constitute less than 10% of the United States industry and produce less than 8% of the soil pipe produced in the United States, yet they were held to be a separate and distinct industry in the United States, within the meaning of the statute. Moreover, it was held that imports which constituted less than four-tenths of 1% of U. S. production and sales were injuring, or were likely to injure, an industry which had consistently increased its capacity, production, sales and profits during the period of alleged "dumping."

These allegations raise not only serious legal questions as to constitutional and statutory law, but also grave issues of national policy in the vital field of international trade.

2. Substantial Questions Raised by the Appeal

Since the constitutional issues raised by the complaint are substantial, *cf. Ex parte Poresky*, 290 U.S. 30 (1933), and are not precluded by any previous decisions of this Court, *cf. Calif. Water Service Co.* v. *Redding*, 304 U.S. 252 (1938), since the complaint seeks injunctive relief because of the statute's unconstitutionality, *cf. I.L.G.W.U.* v. *Donnelly Garment Co.*, 304 U.S. 243 (1938), and the prayer for injunctive relief has been pressed by Appellants, *cf. Stratton* v. *St. Louis S.W. Ry.*, 282 U.S. 10, 14 (1930), there remains for consideration only the questions relating to the jurisdiction of the District Courts as compared to that of the Customs Courts.

The heart of the problem presented by this Appeal is in the conflict between the decision below, which denies District

Court jurisdiction because the exclusive remedy lies in the Customs Court, and decisions of the Customs Court that it has neither remedy nor power of review in such cases. Thus, the Court below has told Appellants that their challenge to the validity of administrative action and their plea for equitable relief from an administrative penalty can be determined only in a Court which has repeatedly denied its jurisdiction to review the substantive validity of such actions or the legal basis of such penalty. If this conflict is not resolved, then Appellants and all other citizens similarly situated have no remedy, either at law or in equity, to protect themselves against retroactive penalties or, indeed, a complete cessation of business resulting from an arbitrary and capricious administrative decision.

A. *Limited Jurisdiction of Customs Courts*

The United States Customs Court, which the Court below held has exclusive jurisdiction of these issues of constitutional and statutory validity, is an administrative appellate tribunal whose name was changed in 1926 from the Board of General Appraisers to the Customs Court, Act of May 28, 1926. In the determination of regular customs duties, as in the determination of "special dumping duties," the jurisdiction of the Customs Courts is based upon an expert reappraisal of the technical facts that enter into the activities of the Customs appraisers and the Customs collectors in assessing such duties. In the case of regular Customs duties, where no other agency action intervenes between the statute and the collection, this system of judicial review apparently provides a "system of corrective justice * * * complete in itself * * * in relation to the collection of (customs) revenues," *Riccomini* v. *U. S.*, 60 F. 2nd 480 (CA9 1934), *Cottman* v. *Dailey*, 94 F. 2nd 84 (CA4, 1938).

In the case of "special dumping duties," however, where the Finding of the Secretary of the Treasury, and the two administrative determinations which are conditions prece-

dent to that Finding, intervene between the statutory provision and the technical assessment of the duty, no provision is made for review of such agency action and no jurisdiction is vested in the Customs Court to make such review. Section 210 of the Anti-Dumping Act, 19 U.S.C. 169, quoted *supra*, specifically makes the "determination of the appraiser" and the "action of the collector" subject to review in the Customs Court, but makes no provision for Customs Court review of the decision of the Secretary or of the Tariff Commission. This accords with the status of the Customs Court as an administrative tribunal composed of experts in the technical field of appraisement and classification. The status of the Customs Courts as "special statutory tribunals of limited jurisdiction," *U. S.* v. *Sherman*, 237 U.S. 146 (1915), has been clearly recognized by the Customs Court itself, which has described itself as "a court of limited special jurisdiction, and without equitable jurisdiction," *Cummings-Collins Distillery* v. *U. S.*, 20 Cus. Ct. 93, *aff'd* 36 CCPA 88.

Beyond reviewing the technical evaluation by the appraiser and classification by the collector, the Customs Court has assumed the power to review, within a very narrow orbit, the degree of compliance with the *form* of assessment and collection procedure followed in anti-dumping cases. Where, for example, the Customs officials have not examined the goods as required by statute, *Tower* v. *U. S.*, 21 CCPA 417 (1934), or the Finding of Dumping has not been signed by a proper official, *U. S.* v. *Prym*, 17 CCPA 180 (1929), or the imports involved were not described, *U. S.* v. *Tower*, 14 Ct. Cust. App. 421 (1927), the particular Finding has been ruled invalid and unable to support the assessment.

But where the issue raised by a complaint has turned on the substantive validity of the Secretary's action, the conformance of his action with the mandate of the law, whether it was based on a proper investigation or, indeed, on any investigation at all, or whether it was based on sub-

stantial probative evidence or, indeed, on any evidence, the Customs Court and the Court of Customs and Patent Appeals have repeatedly ruled that they are without authority to inquire into these matters. Thus, the Board of General Appraisers, before it became the Customs Court, ruled that "the finding of the Secretary of the Treasury * * * is an exercise of discretion not reviewable by the Board." *Bd. Gen. App. Abs.* 46501.

The Customs Court has said it is "bound" by the Secretary's finding and "cannot go behind such finding." *Cus. Ct. Abs.* 18998. And the Court of Customs and Patent Appeals has ruled that "if the Secretary of the Treasury has proceeded in the method prescribed by the Congress, we may not judicially inquire into the correctness of his conclusions." *Kleberg & Co.* v. *U. S.*, 71 F. 2d 332, 335, 21 CCPA 110 (1933). See also *U. S.* v. *Tower & Sons*, 14 Ct. Cus. App. 421 (1927), *Kurz & Co.* v. *U. S.*, 13 Ct. Cus. App. 527 (1926); *cf. Duche & Sons* v. *U. S.*, 36 CCPA 19 (1948).

Occasionally, as noted by the Court below, the Customs Courts, while denying their authority to consider the validity of the Secretary's finding, have assumed the power to pass on the constitutionality of the Anti-Dumping Act, in cases otherwise properly before them. *Kleberg* v. *U. S.*, *supra*. This fact does not establish their jurisdiction over such issues, any more than the power of this Honorable Court to pass on issues of state and local law in cases otherwise properly before it (*e.g., Sterling* v. *Constantin*, 287 U.S. 378, 393 (1932), *California Water Service Co.* v. *Redding, supra*) vests this Court with original jurisdiction over such state or local issues. Nor does this assumption of jurisdiction by the Customs Court make their review complete or their remedy adequate, for these courts lack not only the equity jurisdiction necessary to grant the relief demanded, but also the requisite authority to pass on major issues raised in this cause. *Kleberg et al., supra.*

Thus, in these circumstances, the remedy at law is "absent" or, at the very least, "inadequate," within the

meaning of the Administrative Procedure Act, 5 U.S.C. 1009(b), and jurisdiction properly lies in the District Court, sitting as a court of equity, as the only reviewing court competent to pass on all the major issues presented and to grant the relief demanded.

B. *Jurisdiction of District Courts*

The jurisdiction of the District Courts to consider a variety of "customs" matters dealing with problems other than appraisement or classification is apparent both from the law and the decisions. Aside from the general grant of 28 U.S.C. 1331, the Judicial Code, 28 U.S.C. 1340, specifically vests in the District Courts "original jurisdiction of any civil action arising under any Act of Congress providing for * * * revenue from imports * * * except matters within the jurisdiction of the Customs Court." If this provision is to have any meaning, it must be that there are matters relating to customs ("revenue from imports") that are *not* within the exclusive jurisdiction of the Customs Court. See *Croton Watch Co.* v. *Laughlin*, 208 F. 2d 93 (CA2, 1953); *U. S.* v. *Marshall Field Co.*, 94 F. 2d 210 (CCPA, 1938); *cf. De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Goetze* v. *U. S.*, 182 U.S. 221 (1901); *Cosulich Line* v. *Elting*, 40 F. 2d 220 (CA2, 1930).

The need for District Court review in these circumstances is emphasized, though not necessarily dependent upon, the further fact that the "special dumping duties" here involved are not Customs duties assessable under a taxing statute, but are penalties imposed by a regulatory statute. The "special dumping duty" imposed over and above the regular Customs duty on the imports is comparable in all respects to the "additional duty" for undervaluation held to be a penalty in *Helwig* v. *U. S.*, 188 U.S. 605 (1903), and the "additional duty" for failure to mark properly, held to be a penalty in *Cotonificio Bustese* v. *Morgenthau*, 121 F. 2d 884 (C.A.D.C. 1941). Since the reviewing power of the

Customs Courts is based upon its expert analysis of appraisement and classification problems, 28 U.S.C. 1541, the Courts have held that problems involving penalties, which are independent of such appraisement or classification, are properly cognizable in a District Court, *Helwig* and *Bustese, supra.*

C. *Limitations on Nonreviewable Discretion*

We submit that the Court below in denying its own jurisdiction over the issues and relegating Appellants to another Court which has consistently denied its jurisdiction cannot be sustained unless the agency actions here involved are not reviewable in any Court. If this is so, then the violation of due process becomes complete, for not only is the agency given *carte blanche* to devise its own procedures and establish its own definitions and standards, but it is also entirely free of any procedural safeguards that might restrain the unfettered exercise of administrative caprice, *U. S.* v. *The Rock Royal Cooperatives*, 307 U.S. 533 (1939).

The close similarity between the Anti-Dumping Act and the Robinson-Patman Act, already noted, *supra* p. 5, emphasizes the inequity and invalidity of the procedure to which Appellants have been forced by the decision below. If exclusive review lies in a court which can consider only the correctness of the *amount* of the penalty but can not consider either the procedure or the substantiality of the evidence supporting the finding of price discrimination and injury, then it is as though a court reviewing a Robinson-Patman action could pass on the amount of treble damages but could not review the evidence to see whether the law had in fact been violated.

This unwarranted and unnecessary extension of the doctrine of unreviewable discretion is apparently based on a misconstruction of the principles enunciated by this Court in *U. S.* v. *Geo. S. Bush & Co., Inc.*, 310 U.S. 371 (1940), *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U.S. 294 (1933), *J. W. Hampton Co.* v. *U. S.*, 276 U.S. 394 (1928).

The area of unreviewable administrative discretion has been severely circumscribed by statute and the decisions of this Court. When the applicability of a Congressional enactment turns on a decision by the President that, "in his opinion" or "in his judgment," a particular situation exists, such as a state of war in this country (*Martin* v. *Mott*, 12 Wheat. 19 (1827)) or abroad (*U. S.* v. *Curtiss-Wright Export Co.*, 299 U.S. 304 (1936)), such determination is obviously conclusive. When the applicability of a statute turns on the existence of "physical facts as to which there is little room for difference of opinion" (*Door* v. *Donaldson*, 195 F. 2d 764 (CADC, 1952)), such as the existence of cost differentials under the "flexible tariff" provisions (*U. S.* v. *George S. Bush & Co., supra*), the recognition of the existence of such facts is conclusive. When the applicability of the statute turns on a scientific judgment of technical facts peculiarly within the competence of highly specialized administrative officers, like the quality of tea (*Buttfield* v. *Stranahan*, 192 U.S. 470 (1904)) or the effect of a bridge on the navigability of a river (*Monongahela Bridge Co.* v. *U.S.*, 216 U.S. 177 (1910)) it has been held that the judgment of the jury or the reviewing court can not be substituted for that of the administrator.

But, in the case of the Anti-Dumping Act, the Secretary's determination of "fair value" is no more unreviewable than a determination of "fair and reasonable value" by the Federal Power Commission, 16 U.S.C. 807, or a determination of "reasonable" rates by the Interstate Commerce Commission, 49 U.S. 1. And the Tariff Commission's determination of "injury" is no more unreviewable than a determination of "injury" under the antitrust laws, 15 U.S.C. 13. Here there is no peculiar Executive power, or readily ascertainable fact, or scientific judgment of peculiarly technical considerations. There is nothing that sets these administrative determinations apart from the scores of others that

are, and must be, subject to the restraining hand of judicial review.

This conclusion is buttressed by the further fact that the administrative action here involved imposes a penalty rather than a customs duty *(cf. U. S.* v. *George S. Bush & Co., Inc., supra)*; that the administrative sanction is retroactive *(cf. Buttfield* v. *Stranahan, supra)*; that it is made without notice or hearing *(cf. Monongahela Bridge Co.* v. *U. S., supra,* and *Norwegian Nitrogen Products* v. *U. S., supra)*; and that there are no "procedural safeguards" to protect against administrative caprice *(U. S.* v. *Rock Royal Cooperatives, supra)*.

For these reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

JAMES R. SHARP, *Counsel for Appellants*

SHARP & BOGAN
1108 16th Street, N.W.
Washington 6, D. C.

Of Counsel:
EUGENE F. BOGAN
WM. J. BARNHARD